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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 76-6372

LEON WEBSTER QUILLOIN,

Appellant,

v.

ARDELL WILLIAMS WALCOTT
and RANDALL WALCOTT,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF GEORGIA

BRIEF OF APPELLEES

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STATEMENT

This action was commenced by the filing of a Petition for Adoption by Appellee RANDALL WALCOTT to adopt the minor child of his wife, Appellee ARDELL WALCOTT (A. 3). The child involved is DARRELL W. QUILLOIN, who was a male child born December 25, 1964 and is now twelve (12) years of age (A. 23). Darrell is the illegitimate child of Appellee ARDELL WILLIAMS WALCOTT and Appellant LEON WEBSTER QUILLOIN (A. 23). The above said mother and father have never been married to each other (A. 23).

Appellant filed an objection to this adoption and also filed

an application for a Writ of Habeas Corpus for the purpose of establishing visitation rights to the minor child (A. 8, A. 10). In addition, Appellant also filed a petition to legitimate the minor child pursuant to Ga. Code Ann. §74-103 (A. 12).

On June 23, 1976, Appellee RANDALL WALCOTT's petition for adoption as well as Appellant's objection to said adoption, application for a Writ of Habeas Corpus and petition for legitimation were tried before the Honorable Elmo Holt, Judge of the Superior Court of Fulton County, State of Georgia (A. 20).

Elmo Holt, Judge of the Superior Court of Fulton County, State of Georgia (A. 20).

Judge Holt took the case under advisement until July 21, 1976, at which time the Court entered a final order of adoption in favor of Appellee RANDALL WALCOTT, changing the child's name to DARRELL WEBSTER WALCOTT (A. 70). In the same Order, the Court ordered that Appellant's petition for legitimation, application for Writ of Habeas Corpus establishing visitation rights and objection to the adoption be denied (A. 72).

At the time this Order was entered, Judge Holt made the following findings of fact:

(1) Darrell W. Quilloin, a male, minor child, born December 25, 1964, now eleven (11) years of age; is an illegitimate child of Ardell Williams Walcott (mother) and Leon Webster Quilloin (father). The said mother and father are not and never have been married.

(2) The mother has had possession and custody of said child and the child has lived solely or principally with the mother of maternal grandparents all of the child's life, although the child has visited with the father and the paternal grandparents on many occasions.

(3) The father has provided support for the child irregularly, in the form of medical, food, clothing, gifts and toys from time to time.

(4) The principal or primary source of support, on a regular basis, has been the mother or the maternal grandparents.

(5) Overall, the child has been well cared for and has

never been in an abandoned or deprived condition.

(6) The mother is now married to Randall Walcott and has been so married since September 16, 1967, and there is a seven year old child as a result of that marriage.

(7) The mother has recently declined to allow visitation by the father and has declined to accept support by way of toys, gifts, etc., for the child because of disruption of the family and disparity in the treatment of this child and the seven year old half-brother in the home, which causes problems within the family.

(8) The step-father of the child, Randall Walcott (the mother's husband), filed his petition for adoption of the child on March 24, 1976, and the mother consented to such adoption in writing, same being attached to said petition.

(9) The child, though only eleven years of age, expresses his desire to be adopted by the step-father, Randall Walcott, to change his name to Walcott, as well as his desire to continue to visit the biological father, Leon Webster Quilloin, on occasions.

(10) The biological father made no effort to legitimate the child and filed no petition for legitimation until after the aforesaid petition for adoption was filed by Randall Walcott.

(11) The biological father made no effort to obtain regular visitation rights and filed no Habeas Corpus action to establish visitation privileges until after the aforesaid petition for adoption was filed by Randall Walcott.

(12) The biological father is a single man; he is not seeking custody of the child; he objects to the adoption by Randall Walcott and he seeks visitation rights.

(13) The mother objects to the granting of the legitimation and she objects to visitation rights by the biological father.

(14) The proposed adoptive father, Randall Walcott, is a fit and proper person to adopt the child.

(15) The proposed adoption of the child by Randall Walcott is in the best interests of said child.

(16) The proposed legitimation of the child by Leon Webster Quilloin is not in the best interests of the child

at this late date, nor is the granting of the Habeas Corpus relief seeking visitation rights in the best interests of the child, and both should be denied. (A. 71, 72, 73).

On July 21, 1976, Appellant filed his Notice of Appeal of the trial court's ruling to the Supreme Court of Georgia (A. 75). In an opinion decided January 6, 1977, the Supreme Court of Georgia affirmed the trial court's determination in this matter. Appellant made a motion for rehearing to the Supreme Court of Georgia and this motion was denied on January 27, 1977 (A. 88).

Darrell was born December 25, 1964 in Savannah, Georgia (A. 23). The biological parents of the child were Appellee ARDELL WILLIAMS WALCOTT and Appellant LEON QUILLOIN (A. 23). Mrs. Walcott and Mr. Quilloin were not married at the time of Darrell's birth or at any other time (A. 23).

From the time of Darrell's birth, Appellant has never supported him on a regular basis (A. 23). Although Appellant has made irregular contributions of food, medical care, and small amounts of money, the primary support of Darrell was provided by his mother who worked in New York after the child was born (A. 40, A. 53). During this time, Darrell lived with his maternal grandmother who also provided significant amounts of support (A. 40, A. 59). Appellant did provide some medical care for the child during the early part of his life but the last time any medical care was provided by Appellant was when the child was three (3) years old (A. 37).

During the child's early life, Appellant visited the child on an irregular basis (A. 40). However, these visits were infrequent and never lasted more than a week at a time (A. 60).

During the period of time these visits occurred, Appellant owned a nightclub and was in the "whiskey business" (A. 55). Even though this was the case and Appellant kept irregular hours, he made a point of carrying Darrell with him wherever he went (A. 54). Appellant provided a nursery for Darrell in his nightclub so that the child could be with him at all times

(A. 46). During this period of time, Appellant did not feel that this situation was harmful for the child because "it was just our way of life" (A. 54, 55). During these visits, if Appellant was too busy to care for Darrell himself, he arranged for his friends or business associates to care for the child (A. 46).

On September 16, 1967, Appellee ARDELL WILLIAMS WALCOTT married Appellee RANDALL L. WALCOTT (A. 20). Darrell has lived with his mother and step-father since 1969 (A. 21). There is also a seven (7) year old male child as a result of the marriage between Appellees (A. 35).

From the time of Darrell's birth, until the filing of the petition for adoption in this case, Appellant has never attempted to legitimate the minor child or obtain visitation rights through court proceedings (A. 24, A. 25). At the hearing held in this matter, Appellant stated that he did not feel this action was necessary and did not desire to have a judicial determination on the rights of all parties involved (A. 58). Appellant also stated that he had no objection to the present home environment of the minor child and did not desire custody of the child (A. 57).

At this same hearing, Appellee ARDELL WALCOTT stated that it was her opinion that the adoption was in the best interest of the child as well as all other members of the family (A. 31, A 35). She stated that she felt that the normal family life was disrupted on occasions when Darrell visited Appellant and that the material things offered to Darrell by Appellant were not in his best interest (A. 35).

At the hearing, Darrell himself stated that he desired to be adopted by Appellee RANDALL WALCOTT and that he wanted his name changed from Quilloin to Walcott (A. 67).

SUMMARY OF ARGUMENT

I.

The decision of the Georgia Supreme Court in applying Ga. Code Ann. §74-203, and Ga. Code Ann. § 74-403(3) are not violative of the due process of law requirement in view of the entire statutory scheme which allowed Appellant adequate opportunity to protect his parental rights. Ga. Code Ann. §74-103 provides that a father of a illegitimate child may render the same legitimate by petitioning the Superior Court of the county of his residence.

After this petition is granted, the putative father is given all the rights and responsibilities of any other parent and his child could not be adopted without his permission. Since Appellant has never attempted to legitimate the minor child, he should not now be heard to argue that the decision of the Supreme Court of Georgia deprives him of his rights in the minor child when he failed to take the necessary steps to avail himself of these rights.

II.

The decision of the Supreme Court of Georgia does not violate the requirement for equal protection because this decision established a valid category by separating fathers who have not acknowledged paternity of a minor child from those who have married the minor child's mother or legitimated the child. The equal protection clause does not require that all persons be treated equally in all situations and legislation may place special burdens upon defined classes in order to achieve permissible ends. One class of individuals or entities can be treated differently from others without violating the requirement for equal protection as long as the difference is not invidious discrimination and relates to a legitimate state interest.

In this case, the State has a legitimate concern for the well being of its children and the stability of the family unit. In the case of an illegitimate child, there is frequently no father to raise the child and the mother must bear the entire responsibility. In such a situation, it is reasonable for the State to place full responsibility for the child with the parent who is present and has been responsible for the child's upbringing. By failing to legitimate the child, the father has shown a lack of interest in the child and the requirement of his consent before the child can be adopted would raise the very real danger of profit seeking by a father in order to secure his consent to an adoption of the minor child.

III.

Appellant should not be given the right to object to Appellee's petition for adoption in view of his lack of interest in the minor child prior to this time. This lack of interest was expressed by Appellant's failure to support the minor child as required by law, and also by his failure to express his interest in other ways such as regular visits. Assuming arguendo that some putative fathers deserve consideration in situations such as this, Appellant does not in view of this lack of interest.

While considering the rights of Appellant in this situation, this Court should also consider the rights of all the other persons involved, primarily the child himself. Darrell has stated very definitely that he desires to be adopted and to be free of the stigma which results from having a different last name from the remaining members of his family. Also, this Court should consider the rights of both Appellees who have provided both financial and emotional support for the child for the last eight (8) years.

IV.

Even though the Georgia legislature has passed a new adoption statute which becomes effective on January 1, 1978, this Court should not apply this new statute to this case but should apply the law that existed at the time of the lower court's decision. The old statutory scheme promulgated by the legislature of Georgia afforded Appellant sufficient protection for his due process and equal protection rights.

Generally, this Court applies the law in effect at the time it renders its decision but an exception to this general rule is made where necessary to prevent manifest injustice. Such an injustice would occur in this case since the new adoption statute would give Appellant a virtual veto power over Appellee's petition which was filed 21 months before the new adoption statute becomes effective.

ARGUMENT

I.

THE DECISION OF THE SUPREME COURT OF GEORGIA DENYING APPELLANT THE RIGHT TO OBJECT TO THE ADOPTION OF HIS ILLEGITIMATE CHILD DOES NOT VIOLATE THE DUE PROCESS REQUIREMENT OF THE FOURTEENTH AMENDMENT BECAUSE APPELLANT HAD ADEQUATE OPPORTUNITY TO LEGITIMATE THE MINOR CHILD PRIOR TO APPELLEE'S PETITION FOR ADOPTION.

In his brief, Appellant contends that the applicable Georgia statutes in this case as applied to him constitute violations of the due process clause of the Constitution of the United States and that this conclusion is based on the case of *Stanley v. Illinois*, 405 U.S. 645 (1971), [hereinafter cited *Stanley*]. In that case, this Court held that where the natural mother of illegitimate children was dead, the biological father of these

children was entitled to a hearing before custody of the children could be given to the State. This Court based its decision on the fact that the due process clause required a hearing before the father's children could be taken from him and the denial of this hearing was a violation of equal protection.

Appellees submit that *Stanley* is inapplicable here because it can be distinguished on a number of very important factual grounds. First, unlike *Stanley*, the mother in the instant case is alive and is living with the child, along with her husband who is the original petitioner for adoption in this case. Secondly, *Stanley* involved a contest between the biological father of illegitimate children and the State. This case involves a contest between the biological father of an illegitimate child and the stepfather with whom he has been living. In the instant case, the child will remain in the normal family environment that he has become accustomed to, whereas in the *Stanley* situation, the children would be placed in a State institution or a foster home.

Perhaps the most important factual distinction between the instant case and *Stanley* is that, in *Stanley*, the father, mother, and children had lived together as a family prior to the mother's death. *Id.* at 646. This Court felt that this was an extremely important factor since the father was living with the children at the time of the mother's death. *Id.* n.4 at 650. This situation is obviously different from the instant case where Appellant has never lived with the minor child on a regular basis.

The most important factor which takes this case out of the *Stanley* situation is the existence of a Georgia statute by which a father can legitimate his illegitimate minor child. It should be noted at this point that Illinois did not have such a legitimation statute at the time of *Stanley*.[1]

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[1] Illinois does have a statute which deals with the legitimation of illegitimate children after the parents have entered into a ceremonial marriage. See Ill. Rev. Stat. c.89 §17A.

Ga. Code Ann. §74-103 provides:

> "A father of an illegitimate child may render the same legitimate by petitioning the superior court of the county of his residence, setting forth the name, age, and sex of such child, and also the name of the mother; and if he desires the name changed, stating the new name, and praying the legitimation of such child. Of this application the mother, if alive, shall have notice. Upon such application, presented and filed, the court may pass an order declaring said child to be legitimate, and capable of inheriting from the father in the same manner as if born in lawful wedlock, and the name by which he or she shall be known."

Appellee submits that this statute satisfies whatever due process right Appellant has in this case and that this requirement is not violated if the father does not choose to utilize the procedure set forth in the above code section.

In his brief, Appellant implies that he should not be punished for taking legal action which was totally unnecessary in the first place. See Appellant's Brief, pgs 11-12. This argument is untenable since that legal action would have availed Appellant of the very rights that he claims to be deprived of. The instant case presents the situation where an individual has slept on the rights given him by law, rather than being denied these rights as Appellant contends.

In this case, it is undisputed that Appellant never attempted to legitimate the minor child prior to the filing of Appellee RANDALL WALCOTT's petition for adoption (A. 24, A. 58). Appellant has never attempted to obtain visitation rights to the minor child prior to this petition (A. 24, A. 58). He should not now be heard to argue that the decision of the Supreme Court of Georgia deprives him of the rights in the minor child when he failed to take the necessary steps to avail himself of these same rights.

At the hearing held in this matter, Appellant stated that he did not feel it was necessary to legitimate the child or seek to obtain visitation rights (A. 58). Appellant stated that the situation was satisfactory and implied that he did not want

any interference by the courts (A. 58).

It is obvious that the statutes above mentioned to not violate the due process clause of the United States Constitution. The Federal and State requirements of due process are satisfied if one is given notice and an opportunity for a hearing before he is deprived of life, liberty, or property. However, even the Court in *Stanley* acknowledged that due process of law does not require a hearing in every conceivable impairment of a private interest. *Id.* at 650; *Cafeteria Restaurant Worker's Union, etc., v. McElroy,* 367 U.S. 886 (1967).

Appellees submit that any due process requirement which does exist in this situation is satisfied by the existence of the above mentioned legitimation statute. Appellant argues that the only effective due process in this situation is by allowing him to object in the adoption action. However, Georgia is not under any obligation to satisfy Appellant's asserted right to due process at that stage and the statutory scheme which requires him to assert his rights prior to that time is permissible.

This Court has held that vindication of constitutional rights under the due process clause does not demand uniformity of procedure by all the States, but each State is free to devise its own way of securing essential justice. *Hysler v. Florida,* 315 U.S. 411 (1942). This Court has also held that the Fourteenth Amendment does not give Federal Courts the power to impose upon the States their views of a wise economic or social policy. *Dandridge v. Williams,* 397 U.S. 471 (1970).

II.

THE DECISION OF THE SUPREME COURT OF GEORGIA DENYING APPELLANT THE RIGHT TO OBJECT TO THE ADOPTION OF HIS ILLEGITIMATE CHILD DOES NOT VIOLATE THE EQUAL PROTECTION REQUIREMENT OF THE FOURTEENTH AMENDMENT BECAUSE THE

STATE HAS A LEGITIMATE INTEREST IN THE WELL BEING OF ITS CHILDREN AND THE STABILITY OF THE FAMILY UNIT.

Appellant makes the argument that Ga. Code Ann. §74-203 and §74-403(3) violate the requirements of equal protection because they classify all unwed fathers as unfit parents. However, this is not the case. These laws establish a valid category by separating fathers who have not accepted responsibility for paternity of a minor child from those who have legitimated the child or married the child's mother.

The equal protection clause of the Fourteenth Amendment requires that all persons shall be treated alike under like circumstances and conditions. However, it is not a demand that the statute involved necessarily apply equally to all persons and does not require that things which are different in fact to be treated in law as though they were the same; hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. *Rinaldi v. Yager*, 384 U.S. 305 (1966). Equal protection does not mean that a State may not draw lines to treat one class of individuals or entities different from the others; the test is whether the difference in treatment is invidious discrimination. *Lehnhausen v. Lakeshore Auto Parts*, 410 U.S. 356 (1973); *Barrett v. Shiparo*, 411 U.S. 910 (1973); *Carrington v. Rash*, 380 U.S. 89 (1966).

The equal protection clause does not prevent classification if the distinction is based on valid state interests. In *Labine v. Vincent*, 401 U.S. 532 (1971), this Court held that Louisiana's intestate succession laws that bar an illegitimate child from sharing equally with legitimate children are not violative of due process or equal protection. This indicates that a state may make valid classifications of children based on legitimacy if grounded upon valid state interests.

The majority opinion of the Supreme Court of Georgia in this case expresses the State's legitimate concern in this situation:

> "Georgia has concern for the well being of all its children. To further the protection and care of its children, Georgia favors and encourages marriage and child bearing in a family relationship. In the case of an illegitimate child, there is no marriage and, most frequently, there is no father to raise the child; instead there is only a mother. It is reasonable for Georgia to place full responsibility for the illegitimate child of the parent who is present. This placing of full parental power in the mother is consistent with the public policy favoring marriage and the family because the father can chooses to join the family,Ga. Code Ann. §74-101, or can petition to legitimate the child. §74-103.
>
> In the usual case, if the mother of an illegitimate child decides not to raise the child herself and consents to adoption, the State's interest in promoting the family as an institution for child rearing is served since the child will be placed with the adopting family. If the consent of the natural father were also required he might refuse without accepting the responsibility of fatherhood, and the State could be required to server his relationship before the adoption could proceed. In addition, since the father has already shown his lack of interest by his failure to legitimate the child, there would be a very real danger of profit seeking by the father in order to secure his consent to the adoption. Georgia's interest in seeing to the needs of children is served by the statutory scheme. When the illegitimate child's mother consents to adoption, the State and the mother's interest coincide and the child can be placed with a family.
>
> The State's interest is even stronger under the facts of this case. For eleven (11) years the natural father took no steps to legitimate the child or support him. Yet when the stepfather, married to the child's mother, wishes to adopt the boy and accept responsibility for him, the natural father suddenly opposes legal recognition of this family unit" (A. 82, 83).

This Court has held that the equal protection clause requires that, in defining a class subject to legislation, the distinctions that are drawn have some relevance to the purpose for which the classification is made. *Rinaldi v. Yager*, 384 U.S. 305 (1966). Any statutory discrimination will not

be set aside for violating the equal protection clause if any statement of facts reasonably may be conceived to justify it. *Dandridge v. Williams*, 397 U.S. 471 (1970). The State's interest expressed in the majority opinion certainly satisfies these requirements.

In one case since *Stanley*, this Court has had the opportunity to reconsider the rights of a non-custodial putative father. In that case, this Court refused to automatically rule that he stood in the same position as had Peter Stanley. *Rothstein v. Lutheran Social Services*, 405 U.S. 1051 (1972).

The *Rothstein* Court also was presented with a broadly written state statute which declared that a putative father had no rights to notice or to be heard in Wisconsin termination proceedings. As in *Stanley*, there was no question but that the trial court knew of this putative father's existence, was aware of his acknowledgement of paternity, and was apprised of his asserted claim to custody; nevertheless, he was denied a hearing after the mother's rights had been terminated and the child placed with prospective adoptive parents. *State ex rel. Lewis v. Lutheran Social Services*, 47 Wis.2d 420, 178 N.W.2d 56 (1970).

The Wisconsin judgment was vacated by this Court and remanded for further consideration in light of its decision in *Stanley*, but "with due consideration for the completion of the adoption proceedings *and the fact that the child has apparently lived with the adoptive family for the intervening period of time.*" *Rothstein, supra.* (Emphasis supplied). Thus, by the explicit terms of this order handed down subsequent to *Stanley*, this Court has indicated that there are factually distinguishable cases within the broad class of putative fathers and specifically pointed to the interest of the child eligible for adoption as a factor to be weighed in the judicial balance.

Of greatest importance to the consideration of the issues presented in the instant case, however, is this Court's recent dismissal "for want of a substantial federal question" of an appeal from the New York Court of Appeals which upheld

the constitutionality of an adoption statute dispensing with the consent of a father of an illegitimate child despite the fact that he had lived with the mother and child for two years, had admitted paternity in an affiliation proceeding, had been ordered to pay child support, and had apparently complied to some extent with the order. *In re Adoption of Malpica-Orsini*, 36 N.Y.2d 568, 370 N.Y.2d 511, 331 N.E.2d 486 (1975), *appeal dismissed*, 96 S.Ct. 765 (1976) [this case is also sometimes cited as *Orsini v. Blasi*, and will be hereinafter referred to as *Orsini*].

In *Orsini* as in the present case, the father of an illegitimate child was appealing from a decree of adoption granted to a man whom the natural mother had subsequently married. Although under the New York statute no notice of adoption proceedings was required to be given to the putative father, the trial court accorded *Orsini* a full hearing with representation by counsel; therefore, the appellate court held that he had not been denied due process. *Orsini, supra*, 36 N.Y.2d at 576. The same rights were given to Appellant in the present case; thus, by the same rationale, due process was not lacking here.

In *Orsini*, the court emphasized the great benefits of adoption of an out-of-wedlock child from a child-welfare standpoint, and took heed of the apprehension of experts about the effect on adoptions of "the new legalities" engendered by unwed fathers to their children, the New York court concluded that beneficial adoptions would be prevented "or at the very least . . . severely impeded" if unwed fathers were to have the same veto power over the adoption of their children as wed fathers. *Id.*, at 572.

The public policy considerations which weigh against actions such as Appellant's, and in favor of final adoptive placements of illegitimate children are enormous. The best compendium of these policy implications is found, again, in *Orsini*:

> "Illegitimacy and family breakdown have become problems on an unprecedented scale in modern industrial

society. Never before have there been so many children for whom society finds each year that it must make some provision.

To require the consent of fathers of children born out-of-wedlock, or even some of them, would have the overall effect of denying homes to the homeless and depriving innocent children of the other blessings of adoption. The cruel and undeserved out-of-wedlock stigma would continue its visitations.

* * *

Couples considering adoption will be dissuaded out of fear of subsequent annoyance and entanglements . . . The burden on charitable agencies will be oppressive . . . Institutions such as foundling homes which nurture the children for months could not afford to continue their maintenance, in itself not the most desirable, . . . if wards [are] unplaceable. These philanthropic agencies would be reluctant to take infants, for no one wants to bargain for trouble in an already tense situation. The drain on the public treasury would also be immeasurably greater in regard to infants placed in foster homes and public agencies.

Some of the ugliest disclosures of our time involve black marketing of children for adoption. One need not be a clairvoyant to predict that the grant to unwed fathers of the right to veto adoptions will provide a very fertile field for extortion. . . . While it may appear, at first blush, that a father might wish to free himself of the burden of support, there will be many who will interpret it as a chance for revenge or an opportunity to recoup their 'losses.'

Marriages would be discouraged because of the reluctance of prospective husbands to involve themselves in a family situation where they might only be a foster parent and could not adopt the mother's offspring." *Orsini, supra,* at 573-74.

In *Trimble v. Gordon,* 431 U.S. ____, 52 L.Ed.2d ____, 97 S.Ct. 1459, 45 U.S.L.W. 4395, (decided April 26, 1977) [hereinafter cited *Trimble*], the Court held unconstitutional an Illinois statute that permitted only legitimate children to inherit from a father who died intestate. This Court held that this was unconstitutional because it violated the requirement

for equal protection to illegitimate children. This Court stated that in *Trimble* the Illinois Supreme Court had failed to address the relationship between the statute and the promotion of legitimate family relationships and that the statute involved did not have a sufficient relationship to the asserted goal of promoting the family unit.

In this case, Appellees contend that the decision by the Supreme Court of Georgia and the statutory scheme established by the legislature of the State of Georgia do have a direct and obvious relationship to the legitimate state interest of promoting the well being of its children and protecting the stability of the family unit. Therefore, the decision below satisfies the requirements of equal protection where the decision of the Illinois Supreme Court in *Trimble* did not.

In another recent case, this Court has upheld provisions of a federal statute which distinguished between illegitimate children of mothers and those of fathers. *Fiallo v. Bell,* 341 U.S. ____, 52 L.Ed.2d ____, 97 S.Ct. 1473, 45 U.S.L.W. 4402, (decided April 26, 1977) [hereinafter cited as *Fiallo*]. In that case, this Court held constitutional two sections of the Immigration and Nationality Act of 1952 which grants special preference immigration status to "parents" and "children" of American citizens and permanent residents. The definitions in this section include illegitimate children of mothers but not of fathers. In upholding these provisions, this Court relied on the broad congressional power over the admission of aliens into the United States. Appellees submit that the instant case, like *Fiallo,* presents a situation where the State's legitimate interest justifies a disparity in treatment.

III.

APPELLANT SHOULD NOT BE GIVEN THE RIGHT TO OBJECT TO APPELLEE'S PETITION FOR ADOPTION IN THIS CASE BECAUSE HE HAS NOT PROVIDED FINANCIAL SUPPORT FOR THE CHILD AS REQUIRED BY LAW AND HAS NOT OTHERWISE EXPRESSED SUFFICIENT INTEREST IN THE MINOR CHILD.

Throughout his brief, Appellant makes the argument that he should not be discriminated against by not being allowed to object to the adoption of his biological child. Assuming arguendo that some putative fathers should be given this right, Appellees submit that Appellant is not a proper person to object to this adoption because of his lack of financial support for the child and because he has not otherwise expressed sufficient interest in the welfare of the child.

Ga. Code Ann. §74-202 requires the father of an illegitimate child to support that child until majority and reads as follows:

> "The father of an illegitimate child shall be bound to maintain him until said child reaches the age of 18, marries or becomes self-supporting, whichever occurs first. This obligation shall be good consideration to support a contract by him. He may voluntarily discharge this duty; if he shall fail or refuse to do it, the law will compel him; provided, however, that the superior court shall have the power; upon petition of the father, to require the mother of an illegitimate child to contribute to such support upon a determination that the financial circumstances of both the father and the mother are such that justice and equity require the mother to share in, or have responsibility for, such support."

In this case, it is undisputed that Appellant has never supported the child on a regular basis (A. 23). Although he has provided some contributions of food, medical care and money during the early years of the child's life, the primary support of Darrell from the time he was born has been provided by his mother, grandmother and stepfather (A. 22,

A. 40, A. 53).

Also, Appellant has not shown a sufficient interest in the minor child in ways other than financial support. Although the record does indicate that Appellant has visited with the child irregularly and has attempted to give the child presents recently, the record in this case is devoid of any indication that Appellant has made regular attempts to visit with the child or otherwise offer him any type of emotional support.

Assuming arguendo that some putative fathers deserve consideration in situations like those presented in this case, Appellees submit that a distinction should be made based on financial support contributed by the putative father and personal visits or attempted visits made by the putative father on a regular basis.

Appellees would respectfully request the Court to realistically examine situations of women who are left to raise illegitimate children without any financial or emotional support from the child's biological father. Most women in such situations would like nothing more than to have a whole and stable family unit in which the stepfather has completely accepted the mother's child and all family members have the same last name. The biological father should not have the right to preclude such a favorable situation, particularly where he has not provided regular financial or emotional support for the child.

While considering the rights of the putative father in these situations, Appellees would also respectfully request that the Court examine the rights of the most important person involved in this entire situation, the child himself. Where the child's stepfather is willing to adopt him, the child has a right to be adopted and to have the same name as his mother, father and little brother.

In Darrell's mind, the most important aspect of this case is probably the changing of his name from Quilloin to Walcott. This was indicated at the hearing held in this matter when he was asked by counsel for Appellees how he felt about the adoption. Darrell answered simply and eloquently: "I want

my name changed" (A. 67). Only the child himself can fully appreciate the burden he bears in a situation where his last name is different from all of the other members of his family. Appellees would respectfully request that the Court recognize the stigma that Darrell faces in the present situation and to avoid frustrating the obvious wishes of the child in order to protect the rights of a man who has not shown sufficient interest in him from the time he was born.

In addition to Darrell's rights, Appellees would respectfully request that the Court examine their rights in this situation also. Appellee ARDELL WALCOTT has had the primary responsibility for raising this child from its birth without significant financial or emotional support from Appellant. Appellees submit that she should have the final right to determine the outcome of this situation This right is recognized by Ga. Code Ann. §74-203 and Ga. Code Ann. §74-403(3) which are being challenged in this Appeal. Appellee ARDELL WALCOTT indicated her desire to have her child adopted by attaching her consent to the original petition for adoption by Appellee RANDALL WALCOTT (A. 5).

The adopting father is also entitled to have his rights considered in the instant situation. Appellee RANDALL WALCOTT is the person who has provided a home for Darrell for the last eight (8) years. He is the person who has provided the financial and emotional support for Darrell during this period. His rights deserve consideration and as much or more protection as the rights of the biological father who has provided neither financial nor emotional support.

Appellees would also respectfully remind the Court that a decision in Appellant's favor would have a very unsettling effect on adoptions all over the nation. Many of these stable situations would be unsettled and perhaps destroyed if putative fathers were given veto power over adoptions which are in the best interest of the child. The motive of such a person who has not taken sufficient interest to care for the child must be examined carefully. In many of these situations,

including the instant case, the putative father seems more interested in obstructing an orderly situation rather than contributing to the child's welfare. The possibility of blackmail or other improper activities is also apparent in such a situation.

The legislature of the State of Georgia has made a distinction based on financial and emotional support of the minor child in these situations in its revision of the Georgia Adoption Law which becomes effective January 1, 1978. Ga. Acts 1977, pg. 201. The new §74-406 deals with notice to the putative father and sets forth his right to legitimate the minor child.[2]

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[2](a) If the identity and location of the putative father of an illegitimate or legitimate child is known or reasonably ascertainable and he has not executed a surrender as provided in Code §74-404(c), then he shall be notified of the mother's surrender or her consent to the child's adoption to her husband, or the proceeding to terminate her parental rights by registered or certified mail, return receipt requested, at the last known address.

(b) If the identity and location, or either, of the putative father of an illegitimate or legitimate child is not known or reasonably ascertainable then upon motion by either the petitioner(s), Department of Human Resources, or licensed child-placing agency the Court, as soon as practicable, shall make such inquiry as it deems appropriate under the circumstances and shall determine whether the identity and location of the putative father is ascertainable, and whether the putative father lived with the child, contributed to its support, or has given any other tangible indication of interest in the child, so as to entitle him to notice of the mother's surrender or her consent to the child's adoption by her husband, or the proceeding to terminate. If the Court identifies the putative father and determines that he is entitled to notice of the mother's surrender or the proceeding to terminate her parental rights it shall enter an appropriate order designed to afford him such notice. If after inquiry the Court is unable to identify the putative father or concludes that he is not entitled to notice of the mother's surrender or her consent to the child's adoption by her husband, or the proceeding to terminate her parental rights the Court shall enter an order terminating the putative father's rights with reference to the child.

(c) When notice is to be given pursuant to subsection (a) or (b) above, it shall advise the putative father that he loses all rights to the

(continued)

This section gives the putative father the right to legitimate his child within thirty (30) days after receipt of notice that a petition for adoption has been filed. In the instant case, although Appellant did not receive notice of Appellee RANDALL WALCOTT's petition for adoption by registered or certified mail, he did have notice of this petition from agents of the Georgia Department of Family & Childrens Services (A. 57). Prior to this time, Appellant had consulted with his attorney regarding the possible adoption of Darrell (A. 58). These facts indicate that Appellant has had adequate opportunity to protect his interests in this matter.

The record does not indicate the exact date of Appellant's notification of the petition. However, it does indicate that Appellee RANDALL WALCOTT's petition for adoption was filed on March 24, 1976 and Appellant's objection to adoption and petition for legitimation were not filed until May 11, 1976. Appellant has not satisfied the requirements of the new §74-406 and would not have standing to object to Appellees' petition for adoption under the facts of this case if the new statute was applicable.

A new §74-405 deals with situations in which the surrender or termination of parental rights is not required,

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(footnote from preceding page)

child and will neither receive notice nor be entitled to object to the adoption of the child unless he files (1) a petition to legitimate the child pursuant to Code section 74-103, and (2) notice of such petition to legitimate with the court in which the adoption is pending, within thirty (30) days of receipt of such notice.

(d) If a legitimation petition is not filed by the putative father and notice given as required in subsection (c) above within thirty (30) days of his receipt of notice, as provided for in subsection (a) or (b) above, or if after filing such petition, he fails to prosecute it to final judgment he loses all rights to the child and he may not thereafter object to the adoption and is not entitled to receive notice of the adoption.

(e) If the child is legitimated by the putative father, the adoption shall not be permitted except as provided in Code Section 74-403 through 405.

even if a putative father has legitimated his child.[3]

This Code section indicates that the legislature has made a distinction based on financial support and communication which is a large part of the necessary emotional support that any child must have. One who has not provided either on a regular basis should not be allowed to object to the adoption of a minor child which is desired by all other persons who are involved. As mentioned above, Appellant has not complied with his obligation to support the minor child in this case which arises from Ga. Code Ann. §74-202.

IV.

THIS COURT SHOULD NOT APPLY THE NEW GEORGIA ADOPTION STATUTE TO THIS CASE BUT SHOULD APPLY THE LAW AS IT EXISTED AT THE TIME OF THE DECISION OF THE SUPREME COURT OF GEORGIA BECAUSE THE OLD STATUTORY SCHEME AFFORDED APPELLANT SUFFICIENT PROTECTION FOR HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS.

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[3](a) Surrender or termination of parental rights as provided in Code section 74-403 shall not be required as a prerequisite to adoption pursuant to subsections (a)(1), (a)(2), (a)(3) or (a)(4) of Code section 74-403 where a child has been abandoned by a parent, or where such parent of a child cannot be found after a diligent search has been made, or where such parent is insane or otherwise incapacitated from surrendering such rights and the court is of the opinion that the adoption is for the best interest of the child, nor shall a surrender or termination of parental rights as provided in Code section 74-403 be required as a prerequisite to adoption pursuant to subsections (a)(3) or (a)(4) of Code section 74-403 in the case of a parent who has failed significantly without justifiable cause for a period of one year or longer immediately prior to the filing of the petition for adoption

(1) to communicate, or to make a bona fide attempt to communicate with the child or

(2) to provide for the care and support of the child as required by law or judicial decree.

As a general rule, this Court applies the law as it is at the time of decision rather than as it stood at the time of the decision of the Court below. *Kremens v. Bartley*, 431 U.S. ____, 97 S.Ct. 1709, 52 L.Ed.2d 184, 45 U.S.L.W. 451, (decided May 16, 1977); *Sosna v. Iowa*, 419 U.S. 393 (1975). However, this is not always the case and this Court has held that new laws need not always be applied to pending cases in the absence of clear legislative direction to the contrary. *Bradley v. School Board of City of Richmond*, 416 U.S. 696 [hereinafter cited as *Bradley*].

This Court has recognized an exception to the general rule that a court is to apply a law in effect at the time it rendered its decision where this is necessary to prevent manifest injustice. *Bradley, supra; Greene v. United States*, 376 U.S. 149 (1964). In determining whether it would work an injustice to apply a change in the law to a pending case, this Court should consider (a) the nature and identity of the parties, (b) the nature of their rights, (c) the nature of the impact of the change of law on those rights. *Bradley, supra; Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268 (1969).

In the instant case, basing this Court's decision on the old statutory scheme will not deprive Appellant of his due process and equal protection rights because that statutory scheme adequately protected those rights. The problems in this case only arise because Appellant did not take the necessary steps to protect his interest in the minor child.

However, a decision by this Court based on the new adoption statute would give Appellant a virtual veto power over this adoption unless it can be shown that he has not supported the child and has not communicated with the child or made bona fide attempts to communicate with the child for one (1) year prior to the filing of the petition. See, Ga. Acts 1977, pg. 201. Appellees will not be able to bear this burden because the record indicates that Appellant has visited the child within one year prior to the filing of the petition (A. 41, A. 49, A. 60). Therefore, if this case is decided

under the new statute, the adoption that is desired by Darrell and all of the other members of his family will not take place.

Appellees submit that it is not necessary for this Court to remand this case to obtain a decision from the state Court based on the new adoption statute. The only issue involved here is the existence and protection of Appellant's due process and equal protection rights which were adequately protected under the old statutory scheme. Appellees have relied on the old statute and it would be a manifest injustice to eliminate the possibility of an adoption because of a new statute which becomes effective 21 months after the filing of the original petition.

In the past, this Court has been sensitive to injustice which may arise from retrospective application of a change in the applicable law. It has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe unfairly upon the rights of litigants before it. *Claridge Apartments Co. v. Commissioner of Internal Revenue*, 323 U.S. 141 (1944); *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190 (1913).

Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in the cases of this Court for avoiding the "injustice or hardship" by a holding of nonretroactivity. *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). The foremost factor to be considered determining the retroactivity or nonretroactivity is the purpose served by the decision. *Desist v. U.S.*, 394 U.S. 244 (1969); *Tehan v. U.S.*, 382 U.S. 406 (rehearing denied) 383 U.S. 931 (1966).

This Court has held that the Constitution neither prohibits nor requires retrospective application of a judicial decision and that a ruling which is "purely perspective" does not apply even to the parties before the Court. *Linkletter v. Walker*, 381 U.S. 618 (1965). In determining whether and to what extent a new rule should be given retroactive effect, this Court must weigh the merits of the case by looking into the prior history

of the rule in question, its purpose and effect, and whether retroactive application would further or retard its operation. *Linkletter, supra,* accord *Foster v. California,* 394 U.S. 440 (1969); *Jenkins v. Delaware,* 396 U.S. 995 (1969); *Gosa v. Mayden,* 413 U.S. 665 (1973); *Daniel v. Louisiana,* 420 U.S. 31 (1975).

In view of the above authorities, Appellees respectfully request that the Court refrain from remanding this case to the Court of Georgia in the event that this case is decided after January 1, 1978. By so doing, this Court will have protected the interests of Appellees who have relied on the old statutory scheme while protecting the rights of Appellant which were given adequate protection at all stages in this case.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should affirm the judgment of the Court below.

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